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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 445

MAURICE CAMPBELL, Federal Prohibition Administrator for the Second District of New York and JAMES M. DORAN, Federal Prohibition Commissioner of the United States, Petitioners.

vs.

W. H. LONG & COMPANY, INC.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEWIS LANDES,
Counsel for Respondent.

(34,576)

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vs.

W. H. LONG & COMPANY, INC.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

The decree of the Circuit Court of Appeals was entered on July 15th, 1929, evidently predicated upon its decision in *Higgins* v. *Foster*, 12 Fed. (2nd) p. 646. The Higgins case, although decided in 1926, was not appealed by the Government.

The facts and law of the two other cases that are jointly submitted to the Court by the Government on its application for a writ of certiorari, are entirely at

variance with the case at bar. Those cases involved whiskey permits which were limited as to time. The Long & Co. permit provided that it was to remain in force until surrendered or cancelled for violations.

Question Presented.

The question presented, is whether the Prohibition Authorities can disregard the clear provisions of Title 2 of Section 9 of the National Prohibition Act which sets forth the method to be followed in the revoking of a permit.

Statement.

Respondent was issued a permit by the Prohibition Authorities on August 16th, 1923. The permit is as follows:

> "Application and bond having been duly presented and approved, you are hereby authorized to operate a Denaturing Plant located at 49-51 Beach Street, Porchester, New York and Serial Number 123 is assigned thereto.
>
> This permit authorizes the operation of the above described plant or warehouse, the purchase and receipt of alcohol thereto, and the removal therefrom of the manufactured product for any purpose authorized by law or regulations, from the date hereof until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto.
>
> This permit is not transferable."

The permit provided that it should remain in force until surrendered by the holder, or cancelled by the Commissioner for violation of the National Prohibition Act, or Regulations made pursuant thereto (C. C. A. rec. p. 13).

On October 1st, 1927, the Prohibition Department issued what is known as Regulations 2, Article 95 providing, that all permits in effect on October 1, 1927, expire on December 31st, 1928. The Prohibition Authorities denied the renewal application of W. H. Long & Company, although the application stated it was made without prejudice to its original permit. A suit in equity was filed in the United States District Court, for the Southern District of New York, in which the plaintiff was granted a permanent injunction, restraining the Prohibition Authorities from interfering with the permit of Long & Company, except in a manner provided by the National Prohibition Act. On appeal, the Circuit Court of Appeals for the Second Circuit affirmed the decree of the Court below.

ARGUMENT.

Section 9 of Title 2 of the National Prohibition Act protects the Government in the enforcement of the Law.

Section 6 of Title 2 of the National Prohibition Act, has no relation to denatured alcohol, and there is therefore, no statutory provision which sets a term to such permits whether they be assumed to be authorized by Section 4 of Title 2, or Section 13 of Title 3 of the National Prohibition Act. Title 2 of the National

Prohibition Act specifically defines the particular intoxicating beverages that are effected by Title 2, as follows:

> "Section 1. When used in Title II and Title III of this act (1) the word "liquor" or the phrase "intoxication liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

Title III applies to manufacturers engaged in the denaturing alcohol business.

What the Prohibition Authorities are attempting to do, is to evade the specific provisions of the National Prohibition Act (thereby violating the Act).

The proposition of law in this entire case, was presented to the Circuit Court of Appeals, in *Higgins v. Foster,* both on the direct argument and on the reargument, and counsel quotes from the opinion, as follows:

> • • • "We think that Section 6 of Title II has no relation to denatured alcohol and that there is therefore no statutory provision which sets a term to such permits, whether they be assumed to be authorized by Section 4 of Title II or Section 13 of Title III under which Article 21 of Regulation 61 was promulgated by the Commissioner. Section 6 uses the word

"liquor" which is defined by Section 1 of Title II and which seems to us clearly to be confined to beverages It is true that it uses the word, "Alcohol," but that especially in its context precludes denatured alcohol which is not potable. Hence we think that the permit in its original form was not unlawful and that the regulation of November 14, 1925, did more than confine permits for denatured alcohol to the terms prescribed by statute. Again we do not think that by originally making the permit terminable by cancellation the commissioner could evade or meant to evade, Section 9 of Title II assuming for the moment that that section applied to them. In effect it had an indefinite duration, and was subject only to such revocation as the law allowed. It did not lie within the power of the Commissioner by phrasing the permit in the language chosen to escape any requirements of cancellation which the statute imposed.

Moreover, if Section 9 of Title II applies to permits for denatured alcohol, we cannot see that the Commissioner under the guise of legislation may do in gross what he had no power to do in detail." * * *

* * * "Therefore the question comes to whether Section 9 of Title II applies to denatured alcohol. We think that it does." * * *

* * * "In short, Section 9 protected all holders of permits, whether for potable or non-potable intoxicants, while Section 5 prescribed a particular procedure in the case of non-potable permits when the fault lay in the quality of the product.

As Section 9 of Title II precribed that the delinquent must have fifteen days' notice and be

served with a statement of the facts on which he was to suffer revocation, it applied to the plaintiff, if we are right, and the regulation of November fourteenth, 1925, denied him a right which the statute gave him." * * *

On reargument, the Circuit Court of Appeals for the Second Circuit, reasserted its position taken in the original opinion, and said in part as follows:

* * * "It is plain that when the statute was passed there was no suspicion of the ease with which denaturants could be revoked. That, however, can mean no more than that some amendment in the act is necessary to check the grave evil which has now arisen." * * *

The Prohibition Authorities recognizing the defect in the Law, have endeavored to remedy same by introducing in the Senate by Senator Cummins, Senate Bill No. 4102, as follows:

"A BILL

To amend section 6 of Title II of the Act of Congress of October 28, 1919, entitled, the 'National Prohibition Act' as amended and supplemented, is hereby amended by striking out the first sentence thereof and substituting therefor the following:

"The Commissioner shall have the authority to supervise the use of all permits issued under Title II and Title III of the National Prohibition Act, and to refuse to issue, or to refuse to renew any such permits at their expiration, when, in his reasonable discretion, the issuance

of the renewal thereof tends to defeat the purposes of the National Prohibition Act. All permits now in effect or hereafter issued pursuant to the provisions of Title II and Title III of the National Prohibition Act shall be considered as having been issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided,* That the commissioner may without formal application or new bond, extend any permit, granted under Title II and Title III of the National Prohibition Act, or laws now in force, after August 31 in any year to December 31 of the succeeding year: *Provided further,* That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be enforced to exceed ninety days from the day of issuance.

"The commissioner, with the approval of the Secretary, may issue such regulations as may be necessary to carry out the provisions of the National Prohibition Act."

As was said by the lower court, Congress is the proper place for the Prohibition Authorities to present their difficulties, if they have any.

If the Prohibition Authorities believe that a denaturing plant is not complying with the terms and conditions set forth in the Regulations, it is their duty to proceed to revoke the permit under *Title 2 of Section 9* of the National Prohibition Act, which specifically provides the manner in which a permit can be revoked.

U. S. v. *Katz,* 271 U. S. 353, has no bearing upon the issues in this case, neither have the other cases which have been quoted by the Government.

Yudelson vs. *Campbell*, 25 Fed. (2nd) p. 80, has to do with the refusal of an application for a new permit, and not based upon the cancellation of an outstanding permit, such as in the case at bar.

The National Prohibition Act specifically provides, that a hearing shall be granted, before a permit shall be revoked.

Chicago Grain Products vs. *Mellon*, appearing in 14 Fed. (2nd) p. 362, seems to be predicated upon a proposition entirely foreign to the one that was presented to the Circuit Court of Appeals, Second Circuit, in the case of *Higgins* vs. *Foster*.

THE COMMISSIONER OF INTERNAL REVENUE CANNOT MAKE NEW REGULATIONS REVOKING OR CANCELLING A PERMIT ALREADY ISSUED, EXCEPT IN THE MANNER PROVIDED FOR UNDER THE NATIONAL PROHIBITION ACT.

Title 2, Section 9 of the National Prohibition Act, provides as follows:

> "That only if it be found that such person has been guilty of willfully violating any such laws as charged, shall his permit be revoked." * * *

What the Government is attempting to do in this case, is to wipe out a business of the respondent, in clear violation of this provision. The Prohibition Authorities is attempting to evade the specific provisions of an Act of Congress.

No citation has ever been issued against the Respondent, notwithstanding the specific provisions of the Act itself.

A regulation is nothing more than an expression of opinion.

Judge Mayer for the Circuit Court of Appeals in this District, in *Douglas* v. *Edwards*, 298 Fed. Rep., p. 245, said on the question of Regulations:

> "We have not overlooked the treasury regulation (article 107 of Regulations 33, Revised), which interpreted the statute substantially as defendant contends. We are also mindful of the rule that the regulations and practices of administrative departments are entitled to weight and serious consideration in construing a statute; but opposed to this rule is the familiar one that it is for the courts to construe a statute, and not the executive departments of the Government, and where, as here, we are satisfied that the statute requires the construction which we have attributed to it, *a treasury regulation rises to no higher dignity than an expression of opinion.*" (Italics ours.)

The New York Court of Appeals on December 7th, 1925, in *Picone* v. *Commissioner of Licenses*, 241 N. Y. 157, Judge Pound for the Court stated:

> "Laws are made by the law-making powers, and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be"—

In *Friedler* v. *Moss*, 287 Fed. Rep., p. 935, Judge Runyon held as follows:

"I believe that a hearing must first be had under the terms of Section 9 of Title 2, and a defendant be found guilty as charged before there can be a revocation of the permit. If any other interpretation is to be given to the language of this section it will virtually mean that a permittee can to all intents and purposes be adjudged guilty before having any chance whatever to defend himself, and it is entirely possible that this condition might depend upon irresponsible information. If the permittee upon a hearing shall be found guilty of law violation, or of not having acted in good faith, the clause concerning revocation of his permit is mandatory in such Section."

"While this finding is at variance with the language of "Treasury Decision No. 3881," it cannot be argued—

"I am sure, that any official has not the right to exercise authority or to promulgate rules and regulations, except as they have their basis in the original law. I cannot believe that the framers of the National Prohibition Act intended that there should be in any set of circumstances such as those presented in this case a prejudgment or that a business to all intents and purposes legitimate should be held liable to be ruined without a fair hearing and finding of guilt first being had. In this connection the language of Judge Lynch in the matter of New Jersey Wholesale Drug Company *vs.* Brown is appropriate wherein it says 'it would be unjust and unfair to suspend a permit without a hearing, so a hearing was provided for. The authority to arbitrarily prevent the holder of a permit from doing business does not reside in any offi-

cial. The hearing must first be accorded. This I think, is the plain meaning of Section 9.'

"For the above reasons, I am of the opinion that the complainant is entitled to the preliminary injunction prayed for."

In *New Jersey Wholesale Drug Co.* v. *Brown*, reported in 289 Fed. Rep. p. 110, Judge Lynch held as follows:

> "A permit is a property right in the holder to do business. It would be unjust and unfair to suspend it without a hearing, so a hearing was provided for. The authority to arbitrary prevent the holder of a permit from doing business does not appear to reside in any official. The hearing must first be accorded. This I think is the plain meaning of Section 9.

In *Fred Feil Brewing Co.* v. *Blair*, Fed. Rep. Vol. 2 (2d) p. 879, Judge Thompson said:

> "My conclusion therefore is that the Commissioner has no authority to refuse a permit unless based upon some lawful ground, and that lawful ground does not include an arbitrary discretion based upon personal judgment, but must be a judicial discretion based upon some legal ground. If the Commissioner has evidence that a manufacturer has violated the law * * *."

In *Burlington Industrial Alcohol Co.* v. *Blair*, decided on August 13th, 1925, by Judge Manton of this Court, he said:

"The law involved in the issues presented in in this case was very fairly stated by Judge Thompson in Fiel Brewing Company *vs.* Blair, 2 Fed. Rep. 2d series, 879, and by Judge Anderson in the District of Massachusetts in McGill *v.* Mellon. There, both Judges considered the National Prohibition Act, Title 2, Sections 5 and 6."

In *People ex Rel. Doscher* v. *Sisson,* 101 Misc., p. 28, the Court said:

"The Legislature can no more delegate its power to repeal a law than it can to enact one, and it must follow that it cannot delegate its power to suspend the operation of a law, as that in effect is a repeal. This act confers an arbitrary power upon the officials named to 'suspend the privileges' under liquor law certificates already issued or thereafter to be issued, and to prohibit the sale of alcoholic beverages during the whole or a part of the duration of the present war. No rule or regulation is laid down for the guidance of the officials clothed with this power. There is no limitation even upon the exercise of the power. The power granted is absolute. There is nothing to insure any uniformity of action. The officials are left to act as they deem proper. In a word, they are to legislate. Such an act cannot be upheld. People *v.* Klenck Packing Co., 214 N. Y. 121-138, 140 (101 Misc. at 26), the Court said:

"Originally, a 'license' to sell liquor was a mere privilege. It did not involve any right of property, so it could be revoked or sus-

pended pursuant to legislative authority and the holder of it had no legal ground for redress. Metropolitan Board of Excise *v.* Barrie, 34 N. Y., 657, Kresser *v.* Lyman, 74 Fed. Rep. 765. But this is not true of the liquor tax certificates issued under the provisions of the Liquor Tax Law which was first enacted in 1896. Under that law certificates are no longer issued as matter of discretion, but are obtainable as matter of right, if the statutory requirements are met. Under that law the liquor tax certificate confers upon its holder a property right which is well recognized. Matter of Lyman, 160 N. Y., 96; Matter of Livingston, 24 App. Div. 51; Matter of Lyman (Texter certificate), 59 *id.* 217-220. Such a certificate constitutes a contract with the state. Matter of Hilliard, 25 App. Div. 222-225; Affid. 155 N. Y. 702. A license or privilege for selling liquor which does not involve or constitute a property right can be revoked or suspended as already shown, and there are many other authorities to that effect. Stone *v.* Mississippi, 101 U. S. 814; Butcher Union Co. *v.* Crescent City Co., 111 *idem.* 746; Mugler v. Kansas, 123 *item.* 623. On the other hand, where the authorization to sell liquor constitutes a property right it had never been held that it can be taken away, unless proper compensation is made. On the contrary, it has been expressly held that an act passed upon the liquor tax certificate had been issued which purported to empower the commissioner to revoke the certificate under certion conditions was invoked.' "

In the *Matter of Lyman,* 160 N. Y. 102, Judge O'Brien for the Court of Appeals on the question of permits as property rights held as follows:

> "The privilege or right which it confers upon the holder cannot be revoked except in the matter and for the causes provided in the Statute. The holder may invoke the general rules of law for the protection of property in any proceeding, having for its object the forfeiture or destruction of the right which the Certificate confers. A party cannot be subjected to a forfeiture of his rights of property upon a summary investigation before a Judge or Magistrate, but only upon an indictment, or criminal charge conducted according to the Rules governing criminal procedure and after a conviction by a jury. The power to fine and imprison and to forfeit the Certificate depends upon the same condition, and that is the conviction of the offender."

In *Alcohol Warehouse Cop.* v. *Canfield,* decided on December 3rd, 1924, and reported in 11 Fed. Rep. (2d) 214, Judge Knox held as follows:

> "An examination of Titles 2 and 3 of the National Prohibition Law satisfies me that the proceeding looking to the revocation of plaintiffs' permits were properly laid under the provisions of Section 9 of Title 2 of the Act. Section 1 of that Title defines the permit 'permit' as it is used in both Titles 2 and 3 and in Section 13 of that portion of the latter Title that is headed 'general provisions,' the Commissioner is authorized to issue Regulations 'to

prevent the diversion of alcohol to illegal uses.'

"The permits that were held by complainant were issued under Regulations so made."

"Reverting to Section 9 it is provided that:

" 'If at any time there shall be filed with the Commissioner a complaint under oath setting forth facts showing, or if the Commissioner has reason to believe that any person who has a permit is not in good faith conforming to the provisions of the Act.'

the proceedings specified in the Sections having for their purposes the revocation of the permits, may be instituted."

In *Giacomo Rossano* v. *Foster et al.*, Judge Knox on January 21st, 1926, held:

"Of course such changes as may be made cannot divest permittees of any rights they may possess as to the inability of the Commissioner to cancel and revoke permits, unless for causes shown in the matter provided by the statute.

"In the absence of due provocation through violation of regulations by the law by the permittee or his agents, the Commissioner cannot use his new regulations as a means by which to cancel and revoke an outstanding permit."

In *Swanson* v. *Blair* and *Beach Chemical Company* v. *Blair et al.*, Judge Dickinson in the United States District Court, Eastern District of Pennsylvania, held in one opinion applying to both cases, Dec., 1925, as follows:

"A permit has been issued to the plaintiffs to engage in the industrial alcohol business in which they had invested over a quarter of a million dollars. The permit expressly stated that it should be enjoyed until surrendered or revoked in accordance with the law. No renewals or re-issues were required, the original permit continuing in force as of course. This permit had been duly issued in accordance with law and the regulations then in force. The plaintiffs by its authority carried on its business under the direct supervision and continuous inspection of the Department, and so far as the plaintiffs knew in faithful compliance with the regulations and certainly with all orders and instructions given them. No complaints were lodged and no objections made to the manner in which the business was being conducted, and as it was conducted under the supervision and direction of the enforcement officers themselves, no complaints or objections were expected. Some time later (the date of which we were not told) the Department changed its regulations so that permits were limited to the duration of a year and annual applications and renewals or re-issues became necessary. As soon as the new regulations went into effect a revocation proceeding was begun against the permittee in accordance with the Act of Congress. We are relieved of the duty of inquiring into this complaint as it was not pressed, but the proceedings were abandoned and no order of revocation was in form made. It may possibly be that the proceedings were wholly for *in terrorem* purpose because following them about December 10th, 1925 the Department called upon the permittees to file an application for the renewal

of their permit, accompanied with a copy of the new regulations, by the terms of which the permit expired with December 31st, following. Naturally the permittees took this demand to their counsel and just as naturally he accompanied the transmission of the application with a lawyer-like marginal note protesting that the permittees claimed everything and waived nothing. They did, however, in fact file their application. The application, without further notice to the permittee or opportunity to be heard, was returned to them on the last day of the year (the letter returning it being dated December 29th, 1925) with the following comment:

"After careful review of report of investigating officers you are advised that your application has been disapproved—

"As this implies that there has been an investigation a report thereon and a 'careful review' thereof, no complaint can be made of any lack of promptness or indeed celerity in their action. Following thus, on January 2d, 1926, the permittees were put out of business.

"On this fact statement, counsel for plaintiffs submitted for the decision of the Court the two questions of (1) whether the permittees had been denied their rights in violation of the Act of Congress, and (2) if so, whether the act of denial was subject to the courts." * * *

"All of which is now ruled are the two propositions, (1) that the plaintiffs cannot be deprived of any privileges which are theirs otherwise than in accordance with the Acts of Congress and (2) that the plaintiffs have been deprived of their rights in violation of law and should have them restored." * * *

Judge Anderson in *McGill* v. *Mellon*, 5 Fed. Rep. (2d) 262, said in part as follows:

> "It is important to note that Congress had not undertaken to prohibit the industrial use of alcohol. It is at least doubtful whether Congress would have power to prohibit such use. Certainly there is nothing in the Eighteenth Amendment grounding such power. It is unnecessary to discuss the constitutional question; for the National Prohibition Act shows clearly that Congress had no purpose of attempting to prohibit the use of alcohol in manufacturing perfumes, or otherwise in the industrial arts." * * *

Counsel respectfully refers the Court to the decision of the Court of Appeals for the District of Columbia in *Herman Chemical Co.* v. *Blair*, decided by Chief Justice Martin on April 22, 1924.

The acts of the Prohibition Authorities here, very clearly show that they have no legal evidence to justify the revocation of a permit, and therefore attempt to vitiate the acts of Congress, by using the word "cancelling" instead of "revoking."

If the power assumed by the Prohibition Commissioner is illegal, he could not only make a permit expire on December 31st of a year, but he could at his own will say a permit can expire one week or one month after its issuance. Such a procedure will not be tolerated. THE RESPONDENT FEELS CONFIDENT THAT THE COURTS WILL NOT APPROVE THE ACTS OF THE AUTHORITIES IN ALLOWING A MAN TO INVEST THOUSANDS AND THOUSANDS OF DOLLARS IN ITS BUSINESS, AND WITH ONE

SWEEP OF THE PEN WIPE OUT ITS BUSINESS EVEN THOUGH THE AUTHORITIES HAVE NO EVIDENCE OF VIOLATION OF THE LAW.

If the acts of the Prohibition Authorities are approved, it will mean that business and economic life will be held at the mercy of persons who at the time might be Prohibition Administrators and Inspectors, and will be bound by the mere whim and caprice of new officials. The position of the Government is that considerable confusion has been created by reason of the decision of *Higgins* v. *Foster*. The Treasury Officials in Washington have been confused, because they clearly understand what the Circuit Court of Appeals meant by *Higgins* vs. *Foster*.

Conclusion.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE DENIED.

Respectfully submitted,

LEWIS LANDES,
Solicitor for W. H. Long & Company, Inc.